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IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-460

FRED F. FRENCH INVESTING COMPANY, INC., RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

—against—

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATUTE INVOLVED	3
STATEMENT	4
THE QUESTION IS SUBSTANTIAL AND IMPORTANT	9
CONCLUSION	16
APPENDIX:	
A—Opinion of the Court of Appeals of the State of New York	1a
B—Opinion of the Supreme Court, New York County	17a
C—Order of the Court of Appeals Entered May 4, 1976	26a
D—Notice of Appeal to the Supreme Court of the United States	28a
E—Order of Court of Appeals dated September 8, 1976, Denying Motion for Reargument	31a
F—Zoning Resolution of the City of New York	32a
G—Resolution of December 7, 1972 Amending Zoning Map of the City of New York	43a
Diagram	45a
H—Judgment dated April 25, 1974 of the Supreme Court, New York County	46a

PAGE

Cases Cited

Appleby v. City of Buffalo, 221 U.S. 524 15

Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (U.S.D.C.N.D. Cal.) 14

Armstrong v. United States, 364 U.S. 40, 48 13

Bonelli Cattle Company v. Arizona, 414 U.S 313, 331 13

Bryant v. Zimmerman, 278 U.S. 63, 67 3

Bydlon v. United States, 146 Ct.Cl. 764, 175 F.Supp. 891 (U.S.Ct.Cl.) 14

Chappell v. United States, 34 F.673 (C.C.D.Md.) 14

Matter of Charles v. Diamond, 47 A.D.2d 426, 366 N.Y.S.2d 921 14

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 15

City of Miami v. Romer, 73 So.2d 285 (S.Ct.Fla.) 14

Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 289 3

Erznoznik v. City of Jacksonville, 422 U.S. 205, 207 fn. 3 16

Fisher v. City of Syracuse, 423 U.S. 833 12

Foss v. Maine Turnpike Authority, 309 A.2d 339, 64 A.L.R.3d 1230 11

Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 15

Golden v. The Planning Board of the Town of Ramapo, 409 U.S. 1003 ..... 11, 12

Griggs v. Allegheny County, 369 U.S. 84 ..... 10, 12, 16

PAGE

HFH Ltd. v. Superior Court, 125 Cal. Rptr. 365, 371 fn. 14, 542 P.2d 237, 243 fn. 14, cert. den. 424 U.S. ——, 96 S.Ct. 1495 ..... 12, 14

Jordan v. Village of Menomonee Falls, 385 U.S. 4 ..... 11, 12

Kovacs v. Cooper, 336 U.S. 77, 84 15

Lomarch Corp. v. Mayor and Common Council of City of Englewood, 51 N.J. 108, 237 A.2d 881 14

Mailman Development Corp. v. City of Hollywood, 419 U.S. 844 12

Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540, 545, cert. den. 379 U.S. 989 11

Napue v. Illinois, 360 U.S. 264, 271-2 15

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 15

Poulos v. New Hampshire, 345 U.S. 395, 402 16

Pumpelly v. Green Bay Company, 80 U.S. (13 Wall) 166 13

Sneed v. County of Riverside, 218 Cal.App.2d 205, 32 Cal. Rptr. 318 14

St. Louis, I. Mt. & So. Ry. Co. v. Starbird, 243 U.S. 592, 601 3

United States v. Causby, 328 U.S. 256 10-12

Zucht v. King, 260 U.S. 174, 176 16

United States Constitution Cited

Fifth Amendment 15, 16

Fourteenth Amendment 3, 9, 15, 16

PAGE

Statutes Cited

23 U.S.C.:

Sec. 131(g) 9

28 U.S.C.:

Sec. 1257(2) 3, 16, 17

Sec. 2103 17

7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules Sec. 5519(a) and (c) 16

17½ McKinney's Environmental Conservation Law Secs. 24-0705(6) and 25-0404 9

20 McKinney's, General City Law Sec. 20(2)..... 12

23 McKinney's, General Municipal Law Sec. 96-a 9

Texts Cited

American Law Institute, "Model Land Development Code" (Proposed Official Draft), pp. 202-203 15

Annotation: Validity and Construction of "Zoning with Compensation" Regulation, 41 A.L.R.3d 636 .. 9

Bosselman, Callies and Banta, "The Taking Issue" .. 9, 11

Other Authorities Cited

Badler, "Municipal Zoning Liability in Damages—A New Cause of Action" 5 The Urban Lawyer 25 ....10, 14

PAGE

Beuscher, "Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Court: So-Called Inverse or Reverse Condemnation", 1968 Urban Law Annual 1 10

Costonis, "Fair" Compensation and the Accommdation Power: Antidotes for the Taking Impasse in Land Use Controversies", 75 Col.L.R. 1021 10

Costonis, "Development Rights Transfer: An Exploratory Essay", 83 Yale L.J. 75 10

Dunham, "From Rural Enclosure to Re-Enclosure of Urban Land", 35 N.Y.U.L.R. 1238 10

Elliott & Marcus, "From Euclid to Ramapo: New Directions in Land Development Controls", 1 Hofstra L.R. 56 10

Kleiner, "The Unconstitutionality of Transferable Development Rights", 84 Yale L.J. 1101 10

Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility", Winter 1966 Wis. L.R. 3..... 10

Marcus, "Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks", 24 Buffalo L.R. 77 10

Sax, "Takings, Private Property and Public Rights", 81 Yale L.J. 149 10

Sax, "Takings and the Police Power", 74 Yale L.J. 36 10

PAGE

Van Alstyne, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria", 44 So.Cal.L.R. 1 10

Note: "Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance", 26 Stan.L.R. 1439 10

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Appellants,

—against—

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the Court of Appeals of the State of New York, entered May 4, 1976 affirming the order of the Appellate Division, First Department dated February 4, 1975, which affirmed the judgment of the Supreme Court of the State of New York entered April 25, 1974, and submit this Statement to show

that the Supreme Court of the United States has jurisdiction of the appeal and that an important and substantial question is presented.

Opinions Below

The opinion of the Court of Appeals is reported at 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, and is reprinted herein as Appendix A. The affirmance by the Appellate Division without opinion is reported at 47 A. D. 2d 715, 366 N.Y.S.2d 346. The opinion of the Supreme Court is reported at 77 Misc.2d 199, 352 N.Y.S.2d 762 and is reprinted herein as Appendix B.

Jurisdiction

By the first cause of action of appellant Fred F. French Investing Company, Inc.'s ("French") complaint and the cross-claim alleged in the answer of the other appellants, appellants sought judgment against the City of New York ("City") declaring that the December 7, 1972 amendments to the Zoning Resolution and the Zoning Map of the City, which established a Special Park District and zoned certain lands, owned by appellants other than French and mortgaged to French, as Special Park Districts constituted a taking of the land and vested title to it in the City, and directing the City to pay to appellants the fair market value of the property. The order of the Court of Appeals of the State of New York from which this appeal is taken (Appendix C) was entered May 4, 1976 and French's notice of appeal (Appendix D) was filed in the Supreme Court of the State of New York, County of New York on July 13, 1976. A motion for reargument made by appellants other than French was denied by the Court of Appeals on September 8, 1976 (Appendix E). The

jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289; see *Bryant* v. *Zimmerman,* 278 U.S. 63, 67; *St. Louis, I. Mt. & So. Ry. Co.* v. *Starbird,* 243 U.S. 592, 601.

Question Presented

Did the 1972 amendment to the New York City Zoning Ordinance which (1) created a new "Special Park District", (2) provided that "when the Special District is mapped, the area within the Special District shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily", (3) limited use of the area thereafter to "only passive recreational uses" but left such area in private ownership and subject to continuing burdens of taxation and maintenance, and (4) mapped land owned by or mortgaged to appellants as within the Special Park District, constitute a taking in eminent domain within the meaning of Section 1 of the Fourteenth Amendment to the United States Constitution, entitling appellants to just compensation as damages.

Statute Involved

Article IX, Chapter 1 of the Zoning Resolution of the City of New York (originally enacted as Article IX, Chapter 3 thereof), including Sections 91-00 through 91-075 of said Resolution, adopted December 7, 1972. Also involved is the amendment to the Zoning Map, Section No. 8d establishing as P District the lands involved in this ap-

peal. The provisions of the Zoning Resolution and the resolution amending the Zoning Map are reprinted as Appendices F and G.

Statement

In 1970 Fred F. French Investing Company, Inc. ("French") sold the entire Tudor City complex, on Manhattan's east side, to appellant Ramsgate Properties, Inc. ("Ramsgate"). Among the properties included were two private parks known as the North and South Park areas. Thereafter, the North Park area together with three brownstones and an apartment house were conveyed by Ramsgate to appellant North Assemblage Company subject to the $5,443,600 purchase money mortgage which Ramsgate had given plaintiff on the original purchase, and the South Park area together with one brownstone were conveyed by Ramsgate to appellant South Assemblage Company subject to a similar $3,380,000 money mortgage. Each mortgage carried the personal guarantee as to interest of appellant Helmsley for a period of three years, expiring September 30, 1973. When the complaint in the instant action was served, the mortgages were in default and the entire principal and interest under each had been declared due and payable.

The City Planning Commission proposed, and on December 7, 1972 the Board of Estimate approved, an amendment to the Zoning Resolution of the City of New York which established a Special Park District (Appendix F). The zoning map was amended at that time to designate the two Tudor City Park areas as Special Park District "P" (Appendix G). The "P" District created by the ordinance was designed almost exclusively for the Tudor City Parks and only those two parks have been designated as within the Special Park District.

Under the Zoning Resolution in such Districts "only passive recreational uses are permitted" (Appendix F: § 91-02; § 91-00(b)), on-site bulk is limited to "structures incidental to passive recreational uses," and the Special District "shall be open to the public at least from 6 A.M. to 10 P.M. daily." Section 91-02 expressly provides that "*When the Special District is mapped,* the area within the Special District shall be open to the public at least from 6:00 A.M. to 10 P.M. daily" (emphasis supplied). The resolution makes no provision for any charge for use of the parks by the public nor does it include any provision with respect to tax abatement or other tax relief.

The resolution permits the transfer from lots zoned as Special Park District areas to other properties, referred to as "receivng lots," within a designated area of the City, of "development rights" with respect to residential or commercial floor area ratio. Before development rights can be transferred to a receiving lot the Zoning Resolution requires that the Chairman of the City Planning Commission must certify the appropriateness of a program for continuing maintenance of the granting lot (Special Park District area) meeting the following specifications:

(a) The park must be maintained in accordance with an approved maintenance plan.

(b) The park must be developed or maintained as a passive recreational area with lighting, planting, landscaping and sitting areas.

(c) The park must be open to the public at least from 6 A..M. to 10 P.M. daily (Appendix F: § 91-06).

On February 15, 1973 French served a summons and complaint alleging four causes of action. Only the first is

involved in this appeal.* That cause of action expressly alleged

> "9. The re-zoning accomplished by the aforesaid amendments constitutes a taking of the Parks in that it permanently restricts the use of the Parks for any reasonable purpose, leaving the owner subject to the burdens of maintenance and taxation.
>
> "10. Plaintiff is entitled to a declaration that such re-zoning constituted a taking of Tudor City North and South Parks and vested title to the Parks in defendant The City of New York."

French demanded judgment on that cause of action

> "(a) declaring that the re-zoning of the Parks constituted a taking of the Parks and vested title to the premises in defendant The City of New York;**
>
> "(b) directing The City of New York to pay to plaintiff the fair market value of the Parks or so much thereof as does not exceed the sum of the unpaid principal and interest of the Mortgages, together with interest thereon from January 1, 1973, plus the amounts expended by plaintiff for taxes, liens and other like charges to protect the lien of its Mortgages."

The answer of the appellants other than French alleged a cross-claim against the City containing essentially the

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* The other three were on the mortgages and on the Helmsley guarantee.

** The statement in the opening sentence of the Court of Appeals opinion (Appendix A) that the action was brought "to declare unconstitutional" the amendment to the Zoning Resolution is a misreading of the complaint.

same allegations and demand for judgment. The City's answer did not materially contest the facts set forth in the complaint but alleged both as a denial and as an affirmative defense that the zoning amendment constituted a valid exercise of the municipal zoning power and that the amendment was neither confiscatory nor was it a taking of the subject property. The City also alleged as a defense that if the zoning amendment was found to constitute an unconditional taking of plaintiff's property, it should be declared invalid, and that the City should not be subjected to damages for such taking.

Appellants moved for summary judgment. The motion was granted to the extent of declaring the Zoning Resolution invalid, but denied insofar as appellants sought declaration that the Resolution constituted a taking and required the payment of just compensation. The opinion of the Supreme Court (Appendix B) recognized that the motion sought judgment "declaring that the rezoning . . . constitutes an unconstitutional taking by the City of New York . . . which mandates compensation based upon a fair market value of the park area", and held that the rezoning "has totally destroyed the economic value of such plots." While it found the "zoning enactment . . . unconstitutional and beyond the power of the Zoning Authority", it held that appellants were not entitled to damages because "the defendant City of New York has not taken title to the park areas nor has it assumed control or management of the property." Judgment so providing was entered April 25, 1974 (Appendix H). That judgment was affirmed without opinion by the Appellate Division, First Department.

On appeal to the Court of Appeals, the order of the Appellate Division was affirmed (Appendices A and C), and a subsequent motion for reargument was denied by the Court of Appeals on September 8, 1976 (Appendix E). In its opinion affirming, the Court stated:

"While the police power of the State to regulate the use of private property by zoning is broad indeed, it is not unlimited. The State may not, under the guise of regulation by zoning, deprive the owner of the reasonable income productive or other private use of his property and thus destroy all but a bare residue of its economic value. Such an exercise of the police power would be void as violative of the due process clauses of the State and Federal Constitutions (NY Const, art I, § 6; US Const, 14th Amdt, § 1). In the instant case, the city has, despite the severance of above-surface development rights, by rezoning private parks exclusively as parks open to the public, deprived the owners of the reasonable income productive or other private use of their property. The attempted severance of the development rights with uncertain and contingent market value did not adequately preserve those rights. Hence, the 1972 zoning amendment is violative of constitutional limitations."

It concluded, however, that there was "no right to compensation as for a taking in eminent domain" because

> ". . . while there was a significant diminution in the value of the property, there was no actual appropriation or taking of the parks by title or governmental occupation. The amendment was declared void at Special Term a little over a year after its adoption. There was no physical invasion of the owner's property; nor was there an assumption by the city of the control or management of the parks. Indeed, the parks served the same function as before the amendment, except that they were now also open to the public. Absent factors of governmental displacement of private ownership, occupation or management, there was no 'taking' within the meaning of constitutional limitations (see *City of Buffalo* v. *Clements Co.*, 28 NY2d 241, 255-257)."

The Question is Substantial and Important

The present uncertainty of courts, legislatures and legal scholars concerning the point at which land use controls conflict sufficiently with the requirements of the Fourteenth Amendment to the United States Constitution to constitute a taking in eminent domain and require the payment of just compensation is illustrated by the number of instances in which legislative bodies have, in recent years, provided for zoning or other regulation with compensation, conditionally or outright, see e.g., The Federal Aid Highway Act, 23 U.S.C. § 131(g) (billboards); 17½ McKinney's Consolidated Laws of New York, Environmental Conservation Law §§ 24-0705(6) and 25-0404 (wetlands); 23 McKinney's, General Municipal Law § 96-a (landmark preservation); see also Annotation: Validity and Construction of "Zoning with Compensation" Regulation, 41 ALR 3d 636, by the large body of legal writings on the subject and by the number of ways in which the issue has presented itself in recent court decisions.

Foremost among the legal writings is Bosselman, Callies and Banta, The Taking Issue, commissioned by the Council on Environmental Quality of the Executive Office of the President, whose Chairman, Russell E. Train, noted in the Foreword to the book that:

> "Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate

> over land use legislation in the Congress and in State legislatures throughout the country."

The proportions of the academic debate over the issue is indicated by the interest that the instant case, *Fred F. French Investing Co., Inc. v. City of New York* has generated in legal journals: Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies,* 75 Col. L.R. 1021; Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 Yale L.J. 75; Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls,* 1 Hofstra L.R. 56; Kleiner, *The Unconstitutionality of Transferable Development Rights,* 84 Yale L.J. 1101; Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks,* 24 Buffalo L.R. 77, and by the many other seminal and developmental articles that deal with the problem generally: Badler, *Municipal Zoning Liability in Damages —A New Cause of Action,* 5 The Urban Lawyer 25; Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Court: So-Called Inverse or Reverse Condemnation,* 1968 Urban Law Annual 1; Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land,* 35 N.Y.U.L.R. 1238; *Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility,* Winter 1966 Wisc. L.R. 3; Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149; Sax, *Takings and the Police Power,* 74 Yale L.J. 36; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So. Cal. L.R. 1; Note: *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stan. L.R. 1439.

Classic inverse condemnation cases are *Griggs* v. *Allegheny County,* 369 U.S. 84, and *United States* v. *Causby,*

328 U.S. 256, both of which held aircraft overflights so low as to make continuance of a business on premises adjoining an airport, or to render intolerable living conditions in a home similarly located, to constitute compensable takings. While these may be regarded as physical invasions of the land, more recent aircraft cases have rejected the nicety of requiring that "the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land," *Martin* v. *Port of Seattle,* 64 Wash.2d 309, 391 P.2d 540, 545, cert. den., 379 U.S. 989. The principle has been applied likewise to the flooding of lands resulting from off-land activity and most recently to salt damage to crops from the water runoff from public highways salted as a matter of highway safety, *Foss* v. *Maine Turnpike Authority,* 309 A.2d 339, 64 A.L.R.3d 1230. Whether regulatory action less than physical invasion constitutes a "taking" requiring just compensation is an issue constantly being presented in the courts. To attempt to cite and discuss the many cases on the question would unduly extend this Jurisdictional Statement, but it should be noted that Chapter 9 of The Taking Issue, entitled *The Regulatory Taking in Current Case Law* contains an extended discussion of the question in relation to various types of regulations covering mining; flood prone areas; wetlands; beaches; open space in new subdivisions; population density; landmark preservation; and the phasing or timing of residential development. Related problems, not there discussed, arise in the context of properties mapped for condemnation or urban renewal, the acquisition of which is long delayed.

By its dismissal for want of a substantial federal question in *Golden* v. *The Planning Board of the Town of Ramapo,* 409 U.S. 1003 and *Jordan* v. *Village of Menomonee Falls,* 385 U.S. 4, this Court has dealt with some aspects of the problem though in circumstances which, as

indicated by the italicized words in the next sentence, clearly distinguish those cases from the instant one. In *Golden* it recognized that an ordinance which phased subdivision development over an eighteen year period but *allowed the developer to proceed if he provided his own sewage and other facilities* did not constitute a taking; and in *Jordan,* that the requirement that a subdivision developer dedicate part of a new subdivision to park use for recreational activities of *persons his subdivision would bring to the area* was not a taking. And while denial of certiorari is not to be accorded definitive effect, it may be assumed for present purposes that by denying certiorari in *HFH Ltd.* v. *Superior Court,* 424 U.S. —— 96 S.Ct. 1495; *Mailman Development Corp.* v. *City of Hollywood,* 419 U.S. 844 and *Fisher* v. *City of Syracuse,* 423 U.S. 833, this Court has ruled that the mere reduction in value of property occasioned by the enactment of a zoning ordinance is not a taking entitling the property owner to damages in inverse condemnation (*HFH Ltd.* and *Mailman*), nor is long delay in taking property designated for acquisition as part of an urban renewal plan (*Fisher*).

Neither those cases at one end of the spectrum nor the *Griggs* and *Causby* cases, *supra,* at the other, pass upon the issue which is presented by the instant appeal, nor does any other decision of this Court that appellants have found. The essential distinction is that while there was here no physical invasion by the City there was a good deal more than the passive regulation of the usual zoning ordinance (*HFH* and *Mailman*), or the close relationship between the development proposed and the amenities required in the subdivision cases (*Golden* and *Jordan*). Here the City with clear power to acquire land for park use by condemnation (20 McKinneys, General City Law § 20(2)), as well as to zone land in a particular area so that it *may* be used by its *owners* for park purposes, has sought to *acquire* specific land for park use by the

public by restricting its permissible use to park lands alone and mandating that from the moment land is mapped (here, December 7, 1972; see Appendix G) that land is open to use by the public (Appendix F, § 91-02). One of the specifically declared purposes of the Ordinance (*Ibid.,* § 91-00(a)) is:

> "To preserve existing *privately owned* open spaces in densely developed areas which are improved with trees, grass, sitting or recreational facilities *for public use*" (Emphasis supplied).

Here, then, the municipality has deliberately used a regulatory power for the purpose of enhancing the park resources available to the public and has added appellants' property to the public use by presently invading the owner's right to own and manage. A formal condemnation proceeding is not a *sine qua non* of a compensable taking, *Pumpelly* v. *Green Bay Company,* 80 U.S. (13 Wall) 166. Moreover, though the above quoted language could hardly more clearly state the City's intent to use appellants' private property for public use, there would be no less a compensable taking because the municipality's action was unintended than were it deliberate, *Armstrong* v. *United States,* 364 U.S. 40, 48; *Bonelli Cattle Company* v. *Arizona,* 414 U.S. 313, 331. This Court's holding in *Armstrong, supra,* that "this acquisition was for a public use, however accomplished" and, therefore, compensable is not dispositive of the instant case, however, since *Armstrong* was a case of total destruction of property whereas the instant case is something less than that.

While there is no decision of this Court determinative of the instant case, there are decisions recognizing the right to damages in inverse condemnation when a municipality seeks to use a zoning ordinance to evade the requirement that it acquire and pay just compensation for

property which it uses for a public purpose. Thus, in *Sneed* v. *County of Riverside,* 218 Cal.App.2d 205, 32 Cal. Rptr. 318, the county rather than acquire land for an air navigation easement simply enacted a zoning ordinance forbidding any structure or vegetation more than three inches high and then operated flights over the area so restricted. The California Court of Appeals held that plaintiff had a cause of action in inverse condemnation, the zoning ordinance having created an actual public use of the property. That Court of Appeals holding was approved by the California Supreme Court in *HFH Ltd.* v. *Superior Court,* 125 Cal.Rptr. 365, 371 fn.14, 542 P.2d 237, 243 fn.14, cert. den. 424 U.S. , 96 S.Ct. 1495. Likewise, the Supreme Court of New Jersey in *Lomarch Corp.* v. *Mayor and Common Council of City of Englewood,* 51 N.J. 108, 237 A.2d 881, concluded that payment of compensation was required where an ordinance of the City permitted it to reserve land on a proposed subdivision plat for a public park and, in effect, to freeze construction at the subdivision for a period of one year pending the City's decision to buy or condemn specific land for the park. Now awaiting argument before the New York Court of Appeals is *Matter of Charles* v. *Diamond,* 47 A.D.2d 426, 366 N.Y.S.2d 921, a case in which the Appellate Division, Fourth Department, held that there was a compensable taking in inverse condemnation where a landowner's development of his land was denied for nine years because of the failure of the village to correct deficiencies in its sewage system. Decisions of similar import are *City of Miami* v. *Romer,* 73 So.2d 285 (S.Ct.Fla.); *Arastra Limited Partnership* v. *City of Palo Alto,* 401 F.Supp. 962 (U.S.D.C.N.D.Cal.) (dealing with an open space ordinance); *Bydlon* v. *United States,* 146 Ct.Cl. 764, 175 F.Supp. 891 (U.S.Ct.Cl.); *Chappell* v. *United States,* 34 F. 673 (C.C.D.Md.); see also Badler, *Municipal Zoning Liability in Damages—A New Cause of Action,* 5 The Urban Lawyer 25.

The genesis of the instant controvery and of the current unsettled state of the case law is Mr. Justice Holmes' statement in *Pennsylvania Coal Company* v. *Mahon,* 260 U.S. 393, 415 "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." There is, however, no fixed rule which dictates where proper regulation ends and a compensable taking begins, *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594, and even the American Law Institute in its Model Land Development Code has eschewed any attempt at definition, (Proposed Official Draft, pp. 202-203).

What this court is asked to set down for oral argument, then, is an important and substantial question of federal constitutional law, which has not been, but should be, settled by this court: Whether a zoning ordinance which mandates that private land which it purports to zone be open for use by the public is, as the New York Court of Appeals characterized it,* but a metaphorical "taking" under the due process clause or whether such an ordinance is in fact a taking for public use for which, under the Fifth Amendment's compensation clause as made applicable to the states by the Fourteenth Amendment, *Chicago, Burlington & Qunicy R.R. Co.* v. *Chicago,* 166 U.S. 226; *Appleby* v. *City of Buffalo,* 221 U.S. 524; see

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* 39 N.Y.2d 587, 594. The Court's conclusion that there was no right to compensation as for a taking in eminent domain was predicated on its holding that "There was no physical invasion of the owner's property; nor was there an assumption by the city of control or management of the parks . . . [though] they were now also open to the public" (Ibid., p. 595). While the state Court's determination of the scope of the ordinance binds this Court, the question whether the mandate of public use constitutes an assumption by the city of control of the land is one of the operation or effect of the ordinance, which is for this Court to decide for itself, *Napue* v. *Illinois,* 360 U.S. 264, 271-2 and cases cited; *Kovacs* v. *Cooper,* 336 U.S. 77, 84.

Griggs v. *Allegheny County,* 369 U.S. 84, just compensation must be paid. On oral argument the court will be asked to state clearly, so that he who runs may read, that as between condemning and paying for private property of which it wishes the use by the public as a park and mandating use of such property by the public as a park through use of the zoning power, without payment, a municipality's action, in whatever form, will be held to be a taking for which compensation must be paid.

The importance of the issue as a practical matter cannot be exaggerated. As the New York Court of Appeals recognized the City's mandatory "contingency-ridden arrangement" (39 N.Y. at 598) very severely depressed the value of the property. The fact that the ordinance was "declared void at Special Term a little over a year after its adoption" (39 N.Y.2d at 595) is no answer, for the City then appealed which by reason of CPLR 5519(a) and (c) (7B McKinney's New York Consolidated Laws, Civil Practice Law & Rules, § 5519(a) and (b)) automatically stayed the effect of that declaration until the May 4, 1976 mandate of the Court of Appeals. Thus, before the matter is ultimately concluded some five years will have passed from enactment to final decision. There is no way other than inverse condemnation for appellants to be restored to that to which they are entitled:—the December 7, 1972 value of the parks.

CONCLUSION

The Zoning Resolution to which the foregoing issue relates is a statute within the meaning of 28 U.S.C. § 1257(2), *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 207 fn.3; *Poulos* v. *New Hampshire,* 345 U.S. 395, 402; *Zucht* v. *King,* 260 U.S. 174, 176. The order appealed from was rendered by the highest court of the

State of New York, its Court of Appeals. The order of that Court and the judgment that it affirmed are both final. The issue which appellants seek to raise—that the ordinance constitutes a taking under the Fifth and Fourteenth Amendments requiring payment of just compensation—was raised in the first pleading in this case and has been passed upon by each of the three courts to which it was presented. Finally, on that constitutional issue the New York courts have held the ordinance valid, that is, have held that it did not constitute a compensable taking. The fact that on another issue—the due process validity of the ordinance—the New York courts have declared the enactment invalid does not deprive this Court of jurisdiction under 28 U.S.C. § 1257(2) to determine the compensation issue on which it was held valid. Should the Court conclude otherwise, it is respectfully requested to consider this Statement as a petition for certiorari, 28 U.S.C. § 2103, and, grant the petition.

For the reasons above set forth the Court should note probable jursidiction or in the alternative should grant certiorari to review the opinion and order of the Court of Appeals of the State of New York.

Dated: New York, New York
September 30, 1976

Bernard S. Meyer and
Fink, Weinberger, Fredman & Charney, P.C.
Attorneys for Appellant, Fred F. French Investing Company, Inc.

APPENDIX A

Opinion of the Court of Appeals of the State of New York

STATE OF NEW YORK
COURT OF APPEALS

1 No. 160

FRED F. FRENCH INVESTING COMPANY, INC.,
Respondent-Appellant,

vs.

THE CITY OF NEW YORK,
Appellant-Respondent,

RAMSGATE PROPERTIES INC., *et al.*,
Respondents-Appellants,

THE PEOPLE &c.,
Defendants.

BREITEL, Ch. J.:

Plaintiff Fred F. French Investing Co., purchase money mortgagee of Tudor City, a Manhattan residential complex, brought this action to declare unconstitutional a

Appendix A

1972 amendment to the New York City Zoning Resolution and seeks compensation as for "inverse" taking by eminent domain. The amendment purported to create a "Special Park District", and rezoned two private parks in the Tudor City complex exclusively as parks open to the public. It further provided for the granting to the defendant property owners of transferable development (air) rights usable elsewhere. It created the transferable rights by severing the above-surface development rights from the surface development rights, a device of recent invention.

Special Term, in studied and painstaking opinion, declared the amendment unconstitutional and restored the former zoning classification, R-10, permitting residential and office building development. The Appellate Division unanimously affirmed, without opinion. By its appeal, the City seeks review of the declaration of unconstitutionality and the denial of its summary judgment motion on the issue of damage. By their cross-appeals, plaintiff mortgagee and defendants, owners and mortgage interest guarantor, seek review of the denial of their summary judgment motions for compensation based on an "inverse" taking.

The issue is whether the rezoning of buildable private parks exclusively as parks open to the public, thereby prohibiting all reasonable income productive or other private use of the property, constitutes a deprivation of property rights without due process of law in violation of constitutional limitations.

There should be an affirmance. While the police power of the state to regulate the use of private property by zoning is broad indeed, it is not unlimited. The state may not, under the guise of regulation by zoning, deprive the owner of the reasonable income productive or other pri-

Appendix A

vate use of his property and thus destroy all but a bare residue of its economic value. Such an exercise of the police power would be void as violative of the due process clauses of the State and Federal Constitutions (N.Y. Const., art. I, §6; U.S. Const., 14th Amdt., §1). In the instant case, the City has, despite the severance of above-surface development rights, by rezoning private parks exclusively as parks open to the public, deprived the owners of the reasonable income productive or other private use of their property. The attempted severance of the development rights with uncertain and contingent market value did not adequately preserve those rights. Hence, the 1972 zoning amendment is violative of constitutional limitations.

Tudor City is a four-acre residential complex built on an elevated level about East 42d Street, across First Avenue from the United Nations in mid-town Manhattan. Planned and developed as a residential community, Tudor City consists of ten large apartment buildings housing approximately 8,000 people, a hotel, four brownstone buildings, and two 15,000 square-foot private parks. The parks, covering about 18½% of the area of the complex, are elevated from grade and located on the north and south sides of East 42d Street, with a connecting viaduct.

On September 30, 1970, plaintiff sold the Tudor City complex to defendant Ramsgate Properties for $36,000,000. In addition to cash, plaintiff took back eight purchase money mortgages, two of which covered in part the two parks. Payment of the mortgage interest for three years was personally guaranteed by defendant Helmsley. Ramsgate thereafter conveyed, subject to plaintiff's mortgages, properties including the north and south parks to defendants, North Assemblage Co. and South Assemblage Co. Each of the mortgages secured in part by the parks has been in default since December 7, 1972.

Appendix A

Soon after acquiring the Tudor City property, the new owner announced plans to erect a building, said to be a 50-story tower, over East 42d Street between First and Second Avenues. This plan would have required New York City Planning Commission approval of a shifting of development rights from the parks to the proposed adjoining site and a corresponding zoning change. Alternatively, the owner proposed to erect on each of the Tudor City park sites a building of maximum size permitted by the existing zoning regulations.

There was immediately an adverse public reaction to the owner's proposals, especially from Tudor City residents. After public hearings, the City Planning Commission recommended, over the dissent of one commissioner, and on December 7, 1972 the Board of Estimate approved, an amendment to the Zoning Resolution establishing Special Park District "P". By contemporaneous amendment to the zoning map, the two Tudor City parks were included within Special Park District "P".

Under the zoning amendment, "only passive recreational uses are permitted" in the Special Park District and improvements are limited to "structures incidental to passive recreational use". When the Special Park District would be mapped, the parks are required to be open daily to the public between 6 a.m. and 10 p.m.

The zoning amendment permits the transfer of development rights from a privately-owned lot zoned as a Special Park District, denominated a "granting lot", to other areas in mid-town Manhattan, bounded by 60th Street, Third Avenue, 38th Street and Eighth Avenue, denominated "receiving lots". Lots eligible to be receiving lots are those with a minimum lot size of 30,000 square feet and zoned to permit development at the maximum commercial density. The owner of a granting lot would be permitted to transfer part of his development rights to any eligible receiving lot, thereby increasing its maximum floor area up to 10%. Further increase in the receiving lot's floor area, limited to 20% of the maximum commercial density, is contingent upon a public hearing and approval by the City Planning Commission and the Board of Estimate. Development rights may be transferred by the owner directly to a receiving lot or to an individual or organization for later disposition to a receiving lot. Before development rights may be transferred, however, the Chairman of the City Planning Commission must certify the suitability of a plan for the continuing maintenance, at the owner's expense, of the granting lot as a park open to the public.

Appendix A

It is notable that the private parks become open to the public upon mapping of the Special Park District, and the opening does not depend upon the relocation and effective utilization of the transferrable development rights. Indeed, the mapping occurred on December 7, 1972, and the development rights have never been marketed or used.

Plaintiff contends that the rezoning of the parks constitutes a compensable "taking" within the meaning of constitutional limitations.

The power of the state over private property extends from the regulation of its use under the police power to the actual taking of an easement or all or part of the fee under the eminent domain power. The distinction, although definable, between a compensable taking and a noncompensable regulation is not always susceptible of precise demarcation. Generally, as the Court stated in *Lutheran Church* v. *City of New York* (35 NY2d 121, 128-129):

"[G]overnment interference [with the use of private property] is based on one of two concepts—either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which citizenry is in conflict over land use or where one person's use of his land is injurious to others. (Sax, Taking and the Police Power, 74 Yale L.J. 36, 62, 63). Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation."

As noted above, when the state "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminol-

ogy appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. Thus, for example, in *Arvene Bay Construction Co.* v. *Thatcher* (278 NY 222, 232), the Court stated "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property." Similarly, in *Pennsylvania Coal Co.* v. *Mahon* (260 US 393, 415), a police power and not an eminent domain case, Mr. Justice Holmes stated: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (see, also, e.g., *Lutheran Church* v. *City of N.Y.*, 35 NY2d 121, 129, 132, *supra* ["confiscatory"]; *Golden* v. *Planning Bd. of Ramapo,* 30 NY2d 359, 380, app. dsmd. 409 US 1003 ["taking"]; *Salamar Bldrs. Corp.* v. *Tuttle,* 29 NY2d 221, 225 ["taking"]; *Vernon Park Realty* v. *City of Mount Vernon,* 307 NY 493, 499, *supra* ["confiscatory"]).

The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case, *supra,* was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory". Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric (see *Arverne Bay Construction Co.* v. *Thatcher, supra* at pp 223, 225, 229, 331; *Pennsylvania Coal Co.* v. *Mahon, supra,* at pp 395-396, 414; *Lutheran Church* v. *City of N.Y., supra,* at pp 123, 125, 130-131; *Golden* v. *Planning Bd. of Ramapo, supra,* at pp 363-364, 377 [due process and equal protection clauses]; *Salamar*

Appendix A

Bldrs. Co. v. *Tuttle, supra,* at pp 498, 499). As has been cogently pointed out by Professor Costonis:

> "the goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassing consequences that are largely irreversible."

(Costonis, "Fair" Compensation and Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021, 1035 [footnotes omitted]; for examples of the exceptions described, see *Matter of Keystone Assoc.* v. *State of N.Y.*, 33 NY2d 848, affg. on op. at App Div, 39 AD2d 848; *Matter of Keystone Assoc.* v. *Moerdler,* 19 NY2d 78, 85-86).

In the present case, while there was a significant diminution in the value of the property, there was no actual appropriation or taking of the parks by title or governmental occupation. The amendment was declared void at Special Term a little over a year after its adoption. There was no physical invasion of the owner's property; nor was there an assumption by the City of the control or management of the parks. Indeed, the parks served the same function as before the amendment, except that they were now also open to the public. Absent factors of governmental displacement of private ownership, occupation or management, there was no "taking" within the meaning of constitutional limitations (see *City of Buffalo* v.

Appendix A

J.W. Clements Co., 28 NY2d 241, 255-257). There was, therefore, no right to compensation as for a taking in eminent domain.

Since there was no taking within the meaning of constitutional limitations, plaintiff's remedy, at this stage of the litigation, would be a declaration of the amendment's invalidity, if that be the case. Thus, it is necessary to determine whether the zoning amendment was a valid exercise of the police power under the due process clauses of the State and Federal Constitutions.

The broad police power of the state to regulate the use of private property is not unlimited. Every enactment under the police power must be reasonable (see, e.g., *People* v. *Goodman,* 31 NY2d 262, 265-266; *Goldblatt* v. *Town of Hempstead,* 369 US 590, 594-595). An exercise of the police power to regulate private property by zoning which is unreasonable constitutes a deprivation of property without due process of law (N.Y. Const., art. I, §6; U.S. Const., 14th Amdt, §1; *Vernon Park Realty* v. *City of Mount Vernon,* 307 NY 493, 499, *supra; Nectow* v. *City of Cambridge,* 277 US 183, 188-189; see 1 Rathkopf, The Law of Zoning and Planning §4.02).

What is an "unreasonable" exercise of the police power depends upon the relevant converging factors. Hence, the facts of each case must be evaluated in order to determine the private and social balance of convenience before the exercise of the power may be condemned as unreasonable (see, e.g., *Village of Belle Terre* v. *Boraas,* 416 US 1, 4; *Euclid* v. *Ambler Realty Co.,* 272 US 365, 387; *Stevens* v. *Town of Huntington,* 20 NY2d 352, 355-356).

A zoning ordinance is unreasonable, under traditional police power and due process analysis, if it encroaches on the exercise of private property rights without sub-

stantial relation to a legitimate governmental purpose. A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare. (See, e.g., *Salamar Bldrs. Corp.* v. *Tuttle,* 29 NY2d 221, 224-225, *supra; People* v. *Scott,* 26 NY2d 286, 291; *Nectow* v. *City of Cambridge,* 277 US 183, 187-188, *supra; Euclid* v. *Ambler Realty Co., supra,* at p 397; 1 Rathkopf, *op. cit., supra,* at pp 4-3, 4-26). Moreover, a zoning ordinance, on similar police power analysis, is unreasonable if it is arbitrary, that is, if there is no reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end (see, e.g., *Salamar Bldrs. Corp.* v. *Tuttle, supra,* at pp 226-227; *Matter of Bd. of Educ.* v. *City Council, City of Glen Cove,* 29 NY2d 681, 682; 1 Rathkopf, *op. cit., supra,* at pp 4-3, 4-26).

Finally, and it is at this point that the confusion between the police power and the exercise of eminent domain most often occurs, a zoning ordinance is unreasonable if it frustrates the owner in the use of his property, that is, if it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value (see, e.g., *Lutheran Church* v. *City of N.Y.,* 35 NY2d 121, 130, *supra; Vernon Park Realty* v. *City of Mount Vernon,* 307 NY 493, 499, *supra; Shepard* v. *Village of Skaneateles,* 300 NY 115, 118; *Arverne Bay Construction Co.* v. *Thatcher,* 278 NY 222, 226, 232, *supra; Matter of Eaton* v. *Sweeney,* 257 NY 176, 183; 1 Rathkopf, *op. cit., supra,* §6.02, at p 6-2).

The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner

to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however, initially distributed (Dunham, Legal and Economic Basis for Planning, 58 Colum. L. Rev. 650, 665). In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

In this case, the zoning amendment is unreasonable and, therefore, unconstitutional because, without due process of law, it deprives the owner of all his property rights, except the bare title and a dubious future reversion of full use. The amendment renders the park property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value and deprives plaintiff of its security for its mortgages. Indeed, as Rathkopf has characterized it, the case is an "extreme example" of a deprivation (1 Rathkopf, *op. cit., supra,* at p 6-55; *contra,* Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buffalo L. Rev. 77, 93-94, 105).

It is recognized that the "value" of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put. Thus, the development rights are an es-

sential component of the value of the underlying property because they constitute some of the economic uses to which the property may be put. As such, they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property (cf., *Newport Assoc., Inc.* v. *Solow,* 30 NY 2d 263, 268 [conc. op.], cert. den. 410 US 931).

Of course, the development rights of the parks were not nullified by the City's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the City, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

The problem with this arrangement, as Mr. Justice Waltemade so wisely observed at Special Term, is that it fails to assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property (77 Misc 2d 199, 201). By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed (see Note, The Unconstitutionality of Transferable Development Rights, 84 Yale L.J. 1101, 1110-1111). Hence, when viewed in relation to both the value of the private parks after the amendment, and the value of the development rights detached from the private parks, the amendment destroyed the economic value of the property. It thus constituted a deprivation of property without due process of law.

None of this discussion of the effort to accomplish the highly beneficial purposes of creating additional park land in the teeming city bears any relation to other schemes, variously described as a "development bank" or the "Chicago Plan" (see Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574; Costonis, Develoment Rights Transfer, An Exploratory Essay, 83 Yale L.J. 75, 86-87). For under such schemes or variations of them, the owner of the granting parcel may be allowed just compensation for his development rights, instantly and in money, and the acquired development rights are then placed in a "bank" from which enterprisers may for a price purchase development rights to use on land owned by them. Insofar as the owner of the granting parcel is concerned, his de-

velopment rights are taken by the state, straightforwardly, and he is paid just compensation for them in eminent domain. The appropriating governmental entity recoups its disbursements, when, as, and if it obtains a purchaser for those rights. In contrast, the 1972 zoning amendment short-circuits the double-tracked compensation scheme but to do this leaves the granting parcel's owner's development rights in limbo until the day of salvation, if ever it comes.

With respect to damages caused by the unlawful zoning amendment the issue is not properly before the court. The owner never made such an unequivocal claim and still does not. Instead, it claims compensation for value appropriated as for an "inverse" taking in eminent domain. The mortgagees and personal guarantor make parallel claims. That view of the invalid amendment is not adopted for the reasons discussed at length earlier. The City, on the other hand, seeks a declaration with respect to such damages, but in the absence of allegation or proof that such damages lie, are claimed, or how they have been incurred, there can be no abstract declaration, and therefore there is none.

It would be a misreading of the discussion above to conclude that the court is insensitive to the inescapable need for government to devise methods, other than by outright appropriation of the fee, to meet urgent environmental needs of a densely concentrated urban population. It would be equally simplistic to ignore modern recognition of the principle that no property has value except as the community contributes to that value. The obverse of this principle is, therefore, of first significance: no property is an economic island, free from contributing to the welfare of the whole of which it is but a dependent

part. The limits are that unfair or disproportionate burdens may not, constitutionally, be placed on single properties or their owners. The possible solutions undoubtedly lie somewhere in the areas of general taxation, assessments for public benefit (but with an expansion of the traditional views with respect to what are assessable public benefits), horizontal eminent domain illustrated by a true "taking" of development rights with corresponding compensation, development banks, and other devices which will insure rudimentary fairness in the allocation of economic burdens.

Solutions must be reached for the problems of modern zoning, urban and rural conservation, and last but not least landmark preservations, whether by particular buildings or historical districts. Unfortunately, the land planners are now only at the beginning of the path to solution. In the process of traversing that path further, new ideas and new standards of constitutional tolerance must and will evolve. It is enough to say that the loose-ended transferable development rights in this case fall short of achieving a fair allocation of economic burden. Even though the development rights have not been nullified, their severance has rendered their value so uncertain and contingent, as to deprive the property owner of their practical usefulness, except under rare and perhaps coincidental circumstances.

The legislative and administrative efforts to solve the zoning and landmark problem in modern society demonstrate the presence of ingenuity (see, e.g., *Lutheran Church* v. *City of N.Y.*, 35 NY2d 121, *supra; Newport Assoc., Inc.* v. *Solow,* 30 NY2d 263, *supra; Golden* v. *Planning Bd. of Ramapo,* 30 NY2d 359, *supra*). That ingenuity further pursued will in all likelihood achieve the goals without

placing an impossible or unsuitable burden on the individual property owner, the public fisc, or the general taxpayer. These efforts are entitled to and will undoubtedly receive every encouragement. The task is difficult but not beyond management. The end is essential but the means must nevertheless conform to constitutional standards.

Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question answered in the affirmative.

* * *

Order affirmed, without costs. Question certified answered in the affirmative. Opinion by Breitel, Ch. J. All concur.

Decided May 4, 1976

APPENDIX B

Opinion of the Supreme Court, New York County

SUPREME COURT,
NEW YORK COUNTY,

Individual Calendar, Part XIII.

SAME TITLE

WALTEMADE, J.:

Tudor City, a residential landmark in Midtown Manhattan, bounded generally by 40th and 43rd Streets between Second and First Avenues, is the site under consideration. That complex encompasses some four acres (166,268 square feet) prestigiously situated just south of the United Nations. It contains 15 structures consisting of ten large apartment buildings, a hotel, four brownstone buildings and two parks that have a total area of 30,872 square feet (18½% of the total complex). One of the parks is located south of 42nd Street on Tudor City Place (15,694 square feet) and the other park is north of 42nd Street on Tudor City Place (15,179 square feet). The parks and their use are the subject of this proceeding.

The motion by the plaintiff mortgagee and the motion by the defendant corporations are consolidated for disposition. Both the mortgagee and the owners seek summary judgment against the City of New York. The application of the Tudor City Residents Association for leave to file a brief *amicus curiae* is granted and the position of the tenants has been considered by the court.

Appendix B

On September 30, 1970, the plaintiff, Fred F. French Investing Company, sold the entire complex, subject to a first mortgage, to defendant Ramsgate for a total sum of $36,000,000. In addition to cash, plaintiff received eight purchase money mortgages totaling $22,701,986. One of the mortgages in the sum of $5,443,600 (approximately 15% of the purchase price) was secured by the North Assemblage, which included in addition to the north private park area, three income producing brownstone buildings and a 62 apartment building known as the Heritage. That area produces 3% of the total income generated by the Tudor City complex. The South Assemblage, which does not generate income, is secured by a mortgage of $3,380,000 (approximately 9% of the purchase price) which covers the south park (15,652 square feet) and a vacant brownstone building at 337 East 41st Street.

Immediately after purchase, the new owner proposed the erection of a mixed commercial and residential building using the air rights over East 42nd Street between First and Second Avenues, which envisioned the continuance of park-like open space of more than 40,000 square feet available for use by the general public. This proposal required the shifting of development rights and a zoning change from the park areas zoned R-10 to the area astride 42nd Street zoned C5-3. An alternative proposal was made for the construction of two tall buildings on the established park areas of Tudor City, under the existing zoning.

Both proposals precipitated an immediate reaction from the Community and particularly the residents of Tudor City that led to public hearings by the City Planning

Appendix B

Commission on October 4th and November 8, 1972 where consideration was given to the defendant owners' proposals.

A resolution was voted recommending that the Board of Estimate amend the zoning resolution by establishing a Special Park District designed to promote the public interest, general welfare and environmental amenities by requiring the *owner to continue the parks as a passive recreational area with lighting, planting, landscaping and sitting areas for the public from 6 A.M. to 10 P.M. daily. In what appears to be a recognition by* the City for the need of some modicum of compensation, provision was made for the owners to be granted a waiver of zoning regulations in another area conveniently removed from the environs of the United Nations and the residents of Tudor City, and the transfer of air rights which could be utilized in contravention of any existing zoning, in the area bounded by 38th Street to 60th Street and from Third to Eighth Avenues. The Board of Estimate acted affirmatively on this resolution on December 7, 1972. Pursuant to this action, the owner is confronted with the problem of acquiring 30,000 square feet of property suitable for his purpose in the newly proscribed area but he is left to his own resources for acquisition and funding in what may be an unpredictable market of the future.

The defendant owners have defaulted on the mortgages secured in part by the park areas, and the plaintiff-mortgagee seeks summary judgment pursuant to CPLR §3212 declaring that the rezoning of property in which plaintiff has a security interest, constitutes an unconstitutional taking by the City of New York of the property securing the mortgages, which mandates compensa-

tion based upon a fair market value of the park area, *or so much as does not exceed the sum of the unpaid principal of the mortgage.* In addition, there is a cross claim and motion for a declaratory judgment by the defendant-owners, North Assemblage Company and South Assemblage Company, likewise alleging that the City's action in rezoning the property was an unconstitutional taking and vesting of title in the City of New York that constitutes a de facto condemnation with resultant damages sustained by virtue thereof.

It is not for the courts to legislate where a park shall be established or even when such an improvement should be made. Only the executive and legislative branches of the government are to make such judgments of the particular need, priority and place for such public betterment.

While the City of New York, through its Board of Estimate and the Planning Commission, has the unquestioned right to enact zoning laws respecting the use of property in accordance with a well-considered and comprehensive plan designed to promote public health, safety and general welfare, such power is subject to the constitutional limitations that it may not be exerted arbitrarily or unreasonably (Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405; Vernon Park Realty v. City of Mount Vernon, 307 N. Y. 493, 498, 499). If the change in the use of the property is incidental to a valid exercise of the sovereign's police powers dictated by sound considerations of public safety, health and welfare, then it is a constitutionally privileged act for which no compensation need be paid (Mugler v. Kansas, 123 U. S. 623; Vernon Park Realty v. City of Mount Vernon, supra; Stevens v. Town of Huntington, 20 N. Y. 2d 352).

Usually, a valid zoning change which *restricts* the use of property imposes hardship and a diminution in values (Matter of Wulfsohn v. Burden, 241 N. Y. 288). Americans accept this precept on the basis of a recognition that the greater good for the greater number outweighs the convenience of an individual in the use of real property. If, on the other hand, the zoning regulation goes so far as to *preclude the use of the property for the purpose to which it is reasonably adapted,* it is confiscatory and unconstitutional (Stevens v. Town of Huntington, supra; Vernon Park Realty v. City of Mount Vernon, 307 N. Y. 493). The question in each case is ultimately one of reasonableness, and that, in turn, depends upon a total view of the relevant facts and circumstances.

The City's action in rezoning the areas of the private parks into public recreational areas, has totally destroyed the economic value of such plots and has significantly deprived the plaintiff-mortgagee of its security for the mortgage. Additionally, the defendant-owners have been deprived of the use of the property for an improvement to which it is reasonably adapted.

Thus, the critical question posed in the case at bar, is whether the amendment to the zoning regulations, under the guise of creating a special park district, is a reasonable exercise of governmental police power. The imbalance here is patent. The zoning regulation bars the defendant-owners from any economic use of their property.

Although under the zoning amendment, title to the park areas remains in the owner-defendants, their title is now encumbered by the City's declaration that the two park areas are public, (not limited to the Tudor City resi-

dents) and are to be maintained and kept open from 6 A.M. to 10 P.M. daily at the owners' cost and expense.

Parks, sometimes described as "little islands of soil in the midst of the asphalt", are most desirable and efforts to preserve such delightful community enhancements should be encouraged. Here, however, the owners' property has been singled out and re-zoned without provision for fair, reasonable and just compensation.

Irrespective of the laudatory aspects of any project designed for the public good, the necessary approvals must be obtained in accord with the preservation of the legal rights of those whose land is appropriated, whether they be poor or rich.

A proceeding in condemnation under the existing statutes, a negotiated purchase, or in some instances, the donation of land are the usual acceptable and legal means of establishing a park in the City of New York. But for the outright gifts of land, usage for public purposes is acquired by the payment of compensation to the owner from whom title is acquired. In any event, unless a donor voluntarily contributes funds for the maintenance of a park, the City also assumes all the costs and expenses involved in caring for the upkeep of the recreational areas.

The City's attempt to transfer the existing zoning from the Tudor City private park to another more extensive area of Manhattan, was a gesture, which upon examination does not lend itself to a comprehension of the zoning regulations. Under this proposed transfer of zoning, none of the affected owners or tenants of the property located in and about the new and future site could be heard to voice their objections to the proposed improvement at the transfer site. There has been a second violation of the zoning laws in that the City has pre-empted the rights of those tenants and owners at the future transfer site. The public hearings mandated before a zoning change can be effective would then be an exercise in futility because the City has already imposed the Tudor City zoning at whatever site the defendant-owners select on Manhattan Island as hereinbefore described. The attempt to transfer the defendant-owners zoning rights to the future site is either an oversight of the trammeling of the rights of those persons at the new transfer site, or an expediential disposition of the Tudor City controversy. In any view of the City's moves, the court concludes the amendment to be illegal.

It is understandable that the City's agents appreciate that the value of the two private park plots, located in midtown Manhattan—with its walk-to-work and other prime residential advantages—is exceedingly valuable. The costs of acquisition by negotiated purchase or in a condemnation proceeding would be extremely high. However costly the legal route may prove, the court cannot acquiesce in the means adopted by the City in its attempt to placate those opposed to the erection of two multi-story residential buildings on the private park sites.

However costly, the City is not without its remedy to provide these public parks by pursuing the usual legal avenues of relief.

Both the plaintiff-mortgagee and the defendant-owners claim that the declaration of the special park district warrant their assertion of the doctrine of *inverse* condemnation which each contends entitles them to "fair

and just compensation" from the City for what they consider a "taking" of the two parks.

In Trippe v. Port of New York Authority, 17 A D 2d 472 (reversed on other grounds, 14 N. Y. 2d 119), the court wrote at page 474:

> "In this state, it has been held that an owner asserting a claim for appropriation of his property may pursue his right by an action in equity for an injunction, and for damages; the court may then, as an alternative to the injunction, make an award for the taking (Pappenheim v. Metropolitan El. Ry. Co., 128 N.Y. 436; Van Allen v. New York El. R.R. Co., 144 N.Y. 174). This method of compensation is called inverse condemnation, and has been said to be the equivalent of condemnation (Ferguson v. Village of Hamburg, 272 N.Y. 234, 240)."

The Court notes that neither the plaintiff nor the defendant-owners cite any authority holding that where the zoning authority's action in amending the Zoning Regulations has exceeded its powers in either unlawfully restricting the use of property or in not providing for "just and fair compensation", that the municipality nevertheless is required to retain the property and under such circumstances must pay the fair market value thereof to the owners. None of the cases relied on by the plaintiff in its memorandum, hold that where a zoning enactment is found unconstitutional and beyond the power of the Zoning Authority, as found by this Court in the case at bar, that the owner, or the mortgagee, may elect to require that public funds be expended to acquire the property. In those cases where the Courts have invoked

the doctrine of inverse condemnation, the owners' property had been physically taken and used by the appropriating authorities so that a restoration of the property to the owners was not possible (see Ferguson v. Village of Hamburg, 272 N.Y. 234; Heyert v. Orange & Rockland Utilities Inc., 17 N Y 2d 352; Bucholtz v. Rochester Telephone Corp., 40 A D 2d 283).

In the litigation before this Court, the defendant City of New York has not taken title to the park areas nor has it assumed control or management of the property. The finding by this Court that the enactment of the zoning amendment was unconstitutional and void, automatically restores the property to the R-10 zoning classification it had prior to the adoption of the zoning amendment (Matter of Concordia Collegiate Institute v. Muller, 301 N.Y. 189).

The plaintiff and the defendant-owners have not demonstrated any immediate financial loss because of the enactment of the zoning amendment. A restoration of the R-10 zoning classification places the plaintiff-mortgagee and the defendant-owners in the same position they were prior to the invalid amendment without any diminution in plaintiff's mortgage security and without any loss in the value of the park areas.

Accordingly, the motions by the plaintiff-mortgagee and the defendant-owners for summary judgment are denied. Settle order which shall contain a provision declaring the zoning amendment void and restoring the R-10 zoning classification to both park areas.

Dec. 31, 1973

s/W
J.S.C.

APPENDIX C

Order of the Court of Appeals Entered May 4, 1976

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

FRED F. FRENCH INVESTING COMPANY, INC.,

Respondent-Appellant,

vs.

THE CITY OF NEW YORK,

Appellant-Respondent,

RAMSGATE PROPERTIES, INC., et al.,

Respondents-Appellants,

THE PEOPLE &C.,

Defendant.

The appellant-respondent in the above entitled appeal appeared by W. Bernard Richland, Corporation Counsel, City of New York; the respondent-appellants appeared by Fink, Weinberger, Fredman & Charney, P.C. and Goldstein, Shames & Hyde.

Appendix C

The Court, after due deliberation, orders and adjudges that the order of the Appellate Division is affirmed, without costs. Question certified answered in the affirmative.

Opinion by Breitel, Ch. J.

All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
May 4, 1976.

APPENDIX D

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT
OF THE STATE OF NEW YOFK
COUNTY OF NEW YORK

Index No. 3611/73

FRED F. FRENCH INVESTING COMPANY, INC.,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Defendants-Respondents,

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

Notice is hereby given that Fred F. French Investing Company, Inc., the Plaintiff-Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered May 4, 1976, affirming the order of the Appellate Division, First Department entered Feb-

ruary 4, 1975, insofar as said orders affirmed so much of the judgment entered herein in the office of the Clerk of the County of New York on the 25th day of April, 1974, as denied the motion of plaintiff for summary judgment on the first cause of action, declaring that the Zoning Amendment enacted by resolution of the Board of Estimate of the City of New York on December 7, 1972 establishing a "Special Park District" constituted a taking of the Tudor City park areas referred to in said resolution and directing the City of New York to pay to plaintiff the fair market value of the parks or so much thereof as does not exceed the amounts due plaintiff on the mortgages referred to in the complaint.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
July 12, 1976

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BERNARD S. MEYER
FINK, WEINBERGER, FREDMAN & CHARNEY, P.C.
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To:

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Attorneys for Defendants Ramsgate Properties, Inc., North Assemblage Company, a partnership, South Assemblage Company, a partnership, and Harry B. Helmsley
655 Madison Avenue
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Appendix D

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of New York
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Hon. Norman Goodman
Clerk of New York County
60 Centre Street
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APPENDIX E

Order of Court of Appeals dated September 8, 1976, Denying Motion for Reargument

COURT OF APPEALS
STATE OF NEW YORK

DECISIONS

September 8, 1976

MOTIONS

Mo. No. 810

FRED F. FRENCH INVESTING COMPANY, INC.,
Respondent-Appellant,

v.

THE CITY OF NEW YORK,
Appellant-Respondent,

RAMSGATE PROPERTIES, INC., *et al.*,
Respondent-Appellants,

THE PEOPLE &C.,
Defendants.

Motion for reargument denied.

APPENDIX F

Zoning Resolution of the City of New York

Corrected 1-30-74 Park District

ARTICLE IX
SPECIAL PURPOSE DISTRICTS

Chapter I Special Park District

91-00 General Purposes

The *Special Park District** (hereinafter also referred to as the "Special District") established in this Resolution is designed to promote and protect the public interest, general welfare and amenity. These general goals include, among others, the following specific purposes:

(a) To preserve existing privately owned open spaces in densely developed areas which are improved with trees, grass, sitting or recreational facilities for public use.

(b) To encourage private maintenance of such necessary open spaces by allowing transfer of all development rights pertaining to such areas to *zoning lots* within a designated portion of the Central Business District and limiting their future use to park-related passive recreation for the general public.

(c) To promote the most desirable use of land in this area and thus to conserve the value of land and thereby protect the City's tax revenues.

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* All italics in original. Italized words are defined in Section 12-10 and 91.01.

Appendix F

91-01

Definitions

For the purposes of this Chapter, matter in italics is defined in Sections 12-10 (Definitions) and Section 91.01 (Definitions).

Development Rights

"Development rights" of a *granting lot* located in R10 or commercial districts permitting an equivalent *residential floor area ratio* shall consist of: (i) the maximum *residential* or *commercial floor area* allowed by the applicable regulations of Section 23-15 or Section 33-120.5 as if the *granting lot* were undeveloped less the total *floor area* of any structure thereon, and (ii) the number of *rooms* permitted by the ratio of one *room* per 300 square feet of *residential floor area* transferred.

Developments rights of a granting lot located in R7, R8, or R9 Districts or Commercial Districts permitting an equivalent *residential floor area ratio* shall consist of: (i) 3.3 F.A.R. in R7, 5.8 F.A.R. in R8 and 7.1 F.A.R. in R9 and (ii) the number of *rooms* permitted by the ratio of one *room* per 255 square feet of *floor area* transferred from an R7 District; the number of *rooms* permitted by the ratio of one *room* per 275 square feet of *floor area* transferred from an R8 District; and the number of rooms permitted by the ratio of one *room* per 290 square feet of *floor area* transferred from an R9 District. Any *floor area* transferred from a *granting lot* may be used either for *residential or commercial uses.*

Appendix F

GRANTING LOT

"Granting lot" is a privately owned *zoning lot* within the *Special Park District* existing as of July 1, 1972, (a) which is mapped as a park on the City Map, or (b) although not mapped as a park on the City Map is (i) free of all *development* and containing only trees, grass, benches, walkways and passive recreational facilities including structures incidental thereto; and (ii) if in the form of open space or plaza contiguous to development was not developed as required or integrated space in connection with its adjoining development.

The *granting lots* are confined within an area bounded by 60th Street, East River, 33rd Street, Hudson River and within a Special P District.

The minimum area of such a *granting lot* shall be 4,000 square feet with a minimum dimension of 40 feet.

RECEIVING LOT

"Receiving lot" is a *zoning lot* within an area bounded by 60th Street, Third Avenue, 38th Street, and Eighth Avenue, having an area of at least 30,000 square feet all of which lies within a *commercial district* having a basic *floor area ratio* of 15 and on which *development rights* are transferred.

SPECIAL PARK DISTRICT

"*Special Park District*" is a special purpose district designated by the letter "U' in which special regulations set forth in Article IX, Chapter 1 apply. The *Special Park District* appears on the *zoning maps* superimposed on

Appendix F

other districts and its regulations modify those of the district on which it is superimposed.

PERSON

"Person" is an individual, corporation (whether incorporated for business, public benefit or non-for-profit purposes or otherwise), partnership, trust, firm, organization, other association or any combination thereof.

91-02

GENERAL PROVISIONS

In harmony with the general purpose and intent of this resolution and the general purpose of the *Special Park District* and in accordance with the provisions of this Chapter, *use* regulations of the district on which the *Special Park District* are superimposed are modified to the extent that only passive recreational *uses* are permitted. Bulk regulations of the *Special Park District* permit transfer of *development rights* in accordance with the provisions of this Chapter, but limit on-site bulk to structures incidental to passive recreational *uses.* When the Special District is mapped, the area within the Special District shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily. At the time of transfer of *development rights* from a *granting lot,* the requirements of Section 91-6 (Certification of Transfer of Development Rights by the Commission) shall apply.

Appendix F

91-03

TRANSFER OF DEVELOPMENT RIGHTS FROM GRANTING LOTS

Development rights from a *granting lot* may be conveyed, or otherwise disposed of (i) directly to a *receiving lot* or (ii) to a *person* for subsequent disposition to a *receiving lot* all in accordance with the provisions of this Special District. Any *person* may convey its interest in all or a portion of such *development rights* to another *person* but such *development rights* may only be used for a *development* on a *receiving lot.*

91-04

ADDITION OF DEVELOPMENT RIGHTS TO RECEIVING LOTS

All or any portion of the *development rights* from a *granting lot* may be added to the permitted *floor area* and rooms of a *receiving lot* provided that:

(a) The total *floor area* allowed on such *receiving lot* shall in no event exceed the maximum *floor area ratio* limit set forth in Section 33-120.5 plus 10 percent thereof except as provided in Section 91-07 (special permit bulk modifications). The *residential* portion of a *mixed building development,* on such lot that complies with the provisions of this Section shall be entitled to the maximum *floor area* of 12.00. In no event shall the *floor area ratio* of a *residential building* or *residential* portion of a *mixed building* exceed 12.00; and

(b) The *development* on a *receiving lot* shall include a *covered pedestrian space, throughblock arcade* or

Appendix F

other public amenity which generates *floor area* bonus and which in the aggregate earns a minimum bonus *floor area ratio* equivalent to 2.50.

In no event shall the *development rights* permitted by the provisions of this Chapter be transferred into another Special Purpose District unless permitted by the express provision of such Special Purpose District. In the case of a *receiving lot* located in a Commercial District indicated with a suffix CR, the transfer of *development rights* under the provision of this Chapter shall be used solely in connection with a *mixed building development.*

91-05

RECORDATION

At the time of transfer of *development rights* from a *granting lot,* there shall be recorded in the land records, and indexed against such *granting lot* from which *floor area* and *rooms* are removed, an instrument removing all *floor area* and *rooms* from the *granting lot* and prohibiting construction on such lot except that which is incidental to a *development* of passive recreational *uses.* At the time of the addition of *development rights* to a *receiving lot* as provided in Section 91-04 (Addition of Development Rights to Receiving Lot) there shall be recorded in the lands records, and indexed against such *receiving lot* to which *floor area* and *rooms* are added, an instrument transferring the *floor area* and *rooms* to the *receiving lot* benefitted. A certified copy of such instruments shall be submitted to the City Planning Commission upon recordation thereof.

Appendix F

91-06*

CERTIFICATION OF TRANSFER OF DEVELOPMENT RIGHTS BY THE COMMISSIONER

As a condition to the issuance by the Department of Buildings of a permit for *development* on a *receiving lot* which includes *development rights* transferred from a *granting lot* pursuant to this Chapter, the Chairman of the City Planning Commission shall certify the appropriateness of a program for continuing maintenance of the *granting lot* park *development* meeting the following:

(a) The park shall be maintained in accordance with an approved maintenance plan specifying what such maintenance shall consist of, whose responsibility it shall be, and assuring satisfactory execution thereof.

(b) The park shall be developed and/or maintained as a passive recreational area with lighting, planting, landscaping and sitting areas.

(c) The park shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily.

Appendix F

91-07

SPECIAL PERMIT BULK MODIFICATIONS

91-071

GENERAL PROVISIONS

The City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action, may grant special permits authorizing modifications of specified applicable district *bulk* regulations for any *developments* on receiving lots in accordance with the provisions of Section 91-075 (bulk modifications).

In addition to meeting the requirements, conditions and safeguards prescribed by the Commission as set forth in this Chapter, each such *development* shall conform to and comply with all the applicable district regulations on *use, bulk,* supplementary *use* regulations, regulations applying along district boundaries, *accessory signs, accessory* off-street parking and off-street loading, and all other applicable provisions of this resolution, except as otherwise specifically provided in this Chapter.

91-072

ACTION BY THE BOARD OF ESTIMATE

The resolution of approval by the City Planning Commission, together with a copy of the application for a special permit, shall be filed with the secretary of the Board of Estimate, and the Board of Estimate shall act upon such resolution in accordance with the provisions of Section 200 of the New York City Charter.

Appendix F

91-073

REQUIREMENTS FOR APPLICATIONS

An application to the City Planning Commission for the grant of a special permit under the provisions of this Chapter shall include a site plan showing the location and proposed use of all *buildings or other structures* on the site; the location of all vehicular entrances and exits and off-street parking spaces; and such other information as may be required by the City Planning Commission.

91-074

RELATIONSHIP TO PUBLIC IMPROVEMENT PROJECTS

In all cases, the Commission shall deny a special permit application, whenever the *development* will interfere with a public improvement project (including housing, highways, public buildings or facilities, redevelopment or renewal projects, or rights-of-way for sewers, transit, or other public facilities) which is approved by or pending before the Board of Estimate or City Planning Commission, as determined from the calendar of each such agency issued prior to the date of the public hearing on the application for a special permit.

Appendix F

91-075*

BULK MODIFICATIONS

The Commission, by special permit after public notice and hearing, subject to Board of Estimate action, may authorize an increase in *floor area ratio* above the maximum *floor area ratio* set forth in Section 91-04 (addition of development rights to receiving lots) but in no event exceeding the maximum limit set forth in Section 33-120.5 (maximum limit on floor area ratio) plus 20 percent thereof. For such special permit, The Commission may modify the applicable district height and setback regulations. As a condition of approval the Commission shall find:

(a) That the design of the development includes provisions such as, but not limited to, subsurface concourses, subway connections, subsurface head-in and head-out loading berths, covered pedestrian spaces, arcades and public open spaces to ease congestion in the circulation of pedestrians or vehicles;

(b) That the public amenity requirement of Section 91-04(b) earns a minimum bonus *floor area ratio* equivalent to 3.0;

(c) That the distribution of the *bulk* of the total *development* permits adequate access of light and air to surrounding streets and properties; and

(d) That modification of the applicable height and setback requirements is necessary to achieve better site planning.

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* The final paragraph of § 91-075, beginning with the words 'As a further condition' was enacted as a part of § 91-06 but appears in the current edition of the Zoning Resolution as part of § 91-075.

Appendix F

The Commission may prescribe appropriate conditions and safeguards to enhance the character of the surrounding area.

As a further condition for the issuance by the Department of Buildings of such a permit, the Chairman of the City Planning Commission shall certify that:

(d) no lien or security interest of any kind attaches to the *granting lot,* or, If the *granting lot* is encumbered by a security interest, then

(e) by the terms and conditions of the instrument establishing such security interest, the security of the mortgagee or other secured party would not be impaired by the transfer of *development rights* to a *receiving lot,* or

(f) the instrument establishing the terms and conditions of such security interest has been amended to encumber the *development rights* with the same security interest as had detached to the *granting lot,* provided, however, that the Chairman may waive the required certification concerning security interests where a mortgagee or other secured party unreasonably refuses to agree to such an amendment.

APPENDIX G

Resolution of December 7, 1972 Amending Zoning Map of the City of New York

CITY PLANNING COMMISSION

November 8, 1972/Calendar No. 9 CP-22124

An amendment of the zoning map (section 8d) establishing a P District for the private parks known as Tudor City Park, bounded by Tudor City Place, East 41st Street, a line 82 feet west of Tudor City Place, a line 98.75 feet north of East 41st Street, a line 90.33 feet west of Tudor City Place, East 42nd Street, a line 82 feet west of Tudor City Place, and East 43rd Street, Borough of Manhattan, as shown on a diagram dated September 19, 1972.

The zoning amendment was initiated to delineate the boundaries of the new P District.

On September 19, 1972 (Cal. No. 5), the Commission scheduled a Public Hearing on the proposed amendment. The public hearing was held on October 4, 1972 (Cal. No. 8) in conjunction with public hearings on other matters relating to the Tudor City area. There were a number of appearances and the hearing was closed. A discussion of the issues raised at the hearing and the purposes of the amendment are set forth in the related Zoning Resolution amendment report (CP-22128A) establishing a Special Park District which was approved by the Commission on November 8, 1972.

The Commission therefore considered the rezoning appropriate and adopted the following resolution, which is duly filed with the Secretary of the Board of Estimate, pursuant to Section 200 of the New York City Charter:

Appendix G

RESOLVED that the Zoning Resolution of The City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended by changing the Zoning Map, Section No. 8d, establishing a P District for the private parks known as Tudor City Park, bounded by Tudor City Place, East 41st Street, a line 82 feet west of Tudor City Place, a line 98.75 feet north of East 41st Street, a line 90.33 feet west of Tudor City Place, East 42nd Street, a line 82 feet west of Tudor City Place, and East 43rd Street, Borough of Manhattan, as shown on a diagram dated September 19, 1972.

DONALD H. ELLIOTT, Chairman;

GERALD R. COLEMAN, IVAN A. MICHAEL, JOHN E. ZUCCOTTI, Commissioners.

SYLVIA DEUTSCH, Commissioner, not voting.

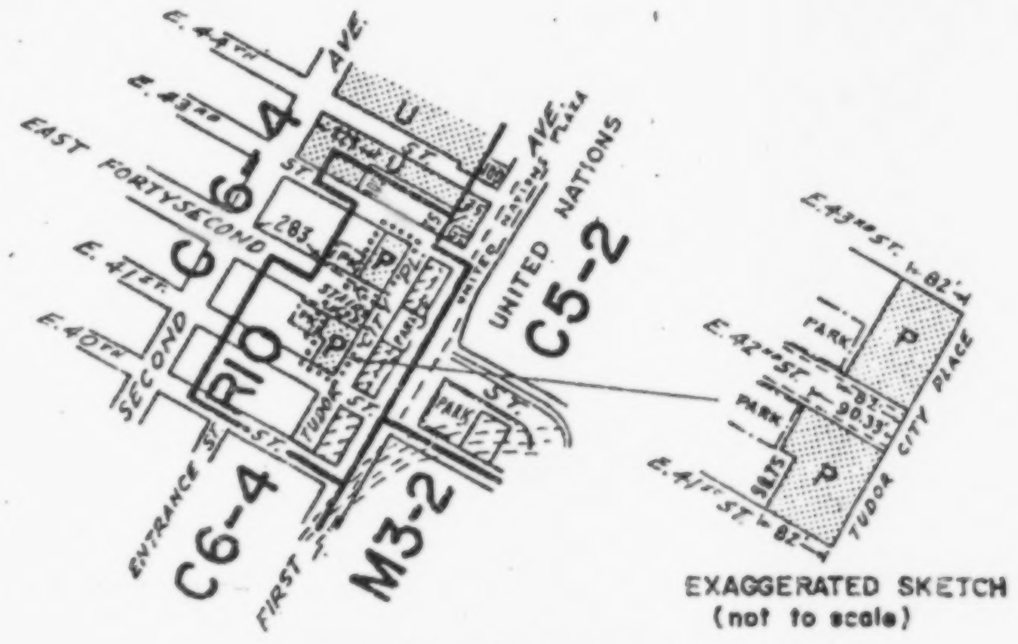
MARTIN GALLENT, Commissioner, voting "No". Dissenting Statement Attached to CP-22128A.

Diagram

[PHOTOSTAT]

(Opposite) ☛

C.P. 22124



CITY PLANNING COMMISSION
CITY OF NEW YORK

DIAGRAM SHOWING PROPOSED ZONING CHANGE ON SECTIONAL MAP

8d

BOROUGH OF MANHATTAN

New York, September 19, 1972

Louis Loberti P.E.
Director, Division of Zoning

Irwin Tuchstone PE
Chief Engineer

SCALE IN FEET
600 300 0 600

NOTE:

——— indicates Zoning District boundary.

. . . . . The area enclosed by the fine dotted line is proposed to be changed by establishing a "P" District.

P indicates a "P" District.

U indicates a "U" District.

indicates a C1-5 District.

APPENDIX H

Judgment dated April 25, 1974 of the Supreme Court, New York County

At an I. C. Part 13, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York, on the 19th day of April. 1974.

Present:

HON. WILFRED A. WALTEMADE, Justice.

[SAME TITLE]

The plaintiff having moved this Court for summary judgment on the first cause of action against the defendants pursuant to CPLR 3212, upon the ground that there are no triable issues of fact and that there are no defenses to the first cause of action; and the defendants North Assemblage Company and South Assemblage Company having moved this Court for summary judgment on their cross-claim against the defendant, The City of New York pursuant to CPLR 3212, upon the ground that there are no triable issues of facts and there are no defenses to the cross-claim; and a motion having been made by the Tudor City Residents Association for permission to file an *amicus curiae* brief,

Now, upon reading and filing the summons and complaint dated February 15, 1973, with exhibits "A" to "H" attached thereto, the answer and cross-claim of the defendants North Assemblage Company, South Assemblage Company, Ramsgate Properties, Inc., and Harry B. Helmsley, verified March 15, 1973; the answer of the defendant The City of New York to the complaint of plaintiff, verified May 15, 1973; the answer of the defendant The City of New York to the cross-claim of the defendants, verified May 15, 1973; and upon the notice of motion dated June 8, 1973, and the affirmation of Bernard S. Meyer, Esq., dated June 8, 1973, together with proof of service annexed thereto, in support of plaintiff's motion; and upon the notice of motion dated June 12, 1973, and the affidavit of Harry B. Helmsley, sworn to June 12, 1973, together with proof of service annexed thereto, in support of defendants' motion; and upon the affidavit of John E. Zuccotti, Chairman of the New York City Planning Commission, sworn to June 26, 1973, with exhibits "A" to "D" attached thereto, the affidavit of Bernard Kabak, Esq., sworn to June 26, 1973, and the affidavit of Ross Burkhardt, sworn to June 26, 1973, with the photographic exhibits attached thereto, together with proof of service annexed thereto, submitted in opposition to the said motions of the plaintiffs and defendants; and upon the notice of motion dated June 20, 1973, and the affidavit of Marvin Levine, sworn to June 20, 1973, together with proof of service attached thereto, in support of the motion to file an *amicus curiae* brief; and the matter having come on to be heard before me on June 27, 1973, and the plaintiff having appeared by Fink, Weinberger, Levin & Charney, Esqs., Bernard S. Meyer, Esq., of Counsel, the defendants North Assemblage, South Assemblage Company, Ramsgate Properties, Inc. and Harry B. Helmsley, have appeared by Goldstein, Shames & Hyde, Esqs., the Tudor City Residents Association having appeared by Levine & Poznansky, Esq., and Norman Redlich, Corporation Counsel of the City of New York, having appeared on behalf of The City of New York; and due deliberation having been had thereon, and upon filing the decision of the Court,

Appendix H

IT IS ORDERED, that:

The motion by the Tudor City Residents Association to file an *amicus curiae* brief is hereby granted, and it is further

ORDERED AND ADJUDGED AND DECLARED that the motion of the plainitff for summary judgment is hereby denied and it is further

ORDERED, ADJUDGED AND DECLARED that the motion of the defendants North Assemblage Company and South Assemblage Company for summary judgment is hereby denied, and it is further

ORDERED, ADJUDGED AND DECLARED that the zoning amendment enacted by the Board of Estimate of the City of New York on December 7, 1972, establishing a "Special Park District" is void and it is further

ORDERED, ADJUDGED AND DECLARED that the R-10 zoning classification in effect prior to the enactment by the Board of Estimate on December 7, 1972, which established a "Special Park District", is hereby restored to both Tudor City park areas, referred to in said resolution of December 7, 1972 and the diagram annexed thereto.

WAW J S C

W. A. W.

ENTER:

J. S. C.

Filed

April 25, 1974

s/ NORMAN GOODMAN
New York
County Clerk Office

Supreme Court, U. S.
FILED
NOV 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1976

No. 76-460

FRED F. FRENCH INVESTING COMPANY, INC.,

Appellant,

-against-

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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IN THE

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MOTION TO DISMISS

Appellee ("City") moves to dismiss the appeal on the ground that it presents no substantial federal question.

Finality

The judgment of the court of first instance, which in effect has been affirmed by the New York Court of Appeals, denied

appellant's motion for summary judgment (10),* but it did not necessarily preclude a recovery after trial. The Court of Appeals observed that there had been no taking by title or governmental occupation, nor physical invasion, nor assumption by the City of the control or management of the land, factors in the absence of which there had been "no 'taking' within the meaning of constitutional limitations" (8a). But that was on the record made on a motion for summary judgment. The judgment here under review does not preclude a trial to establish the presence of such factors.

*Numbers in parentheses refer to pages of the Record, except when followed by "a", where they refer to pages of the appendix to the jurisdictional statement.

Question Presented

New York City enacted a zoning classification which purported to open two privately owned parks to limited access by the public. The change was soon judicially declared to be facially void for the reason that the owners were deprived of all reasonable use of the property, the development rights retained by them being held worthless as matter of law. The same judgment restored the prior zoning classification.

The question presented is whether, given the additional facts regarding use and control which are noted below, there was a taking of the property in eminent domain for which compensation is constitutionally mandated.

Facts

The zoning change was enacted on December 7, 1972. The action was

started on February 23, 1973. The change was declared void on December 31, 1973 (13, 1, 146).

Appellant does not quarrel with the observation of the Court of Appeals that (8a) "there was no actual appropriation or taking . . . by title or governmental occupation . . . no physical invasion of the owner's property . . . [and] the parks served the same function as before the amendment, except that they were now also open to the public". Nor do they question that Court's statement (ibid.) that there was no "assumption by the City of the control or management of the parks" except to urge that the mere fact of the enactment was such an assumption. Cf. Jurisdictional Statement, p. 15, footnote.

To the observations of that Court we add that the owners themselves acted as if the amendment were a nullity. Without waiting for a decision in their suit, they continued to exclude the public from the park (124-126, and photographs following). There was no evidence that any official action attributable to the enactment impeded the owners in their use of the land.

ARGUMENT

(a)

The zoning change had no practical effect. It was a de facto nullity, and so it remained until it was judically declared to be what it had been from the beginning. Nor was a trial required. The amendment was held to be invalid on its face. Under such circumstances there was no taking, and there is no substance to

the question presented.

This Court has refused to review the dismissal of one count of a complaint which pleaded a taking by reason of the confiscatory effect of a zoning change challenged in another count of the same complaint. Mailman Development Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. App., 1974), cert. den. 293 So. 2d 713, cert. den. 419 U.S. 844.

The "academic debate" referred to at page 10 of the Jurisdictional Statement, to the extent that it deals with constitutional mandate as distinct from what is urged as desirable public policy, is largely about the point at which a diminution of property values reaches the "certain magnitude" referred to in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), when "there must be an

exercise of eminent domain and compensation to sustain the act". In this case that issue has already been decided in favor of appellant.

Appellant presses a different proposition. It is that, when it appears upon the face of police power legislation that it would be confiscatory if effectuated, the Due Process Clause gives the property owner an option: to obtain judicial nullification or, against the wishes of the enacting government, to permit the legislation to remain in effect and compel public purchase of the property.

Supreme Court, U. S.
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—against—

THE CITY OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S REPLY MEMORANDUM

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November 1, 1976

TABLE OF CONTENTS

PAGE

APPELLANT'S REPLY MEMORANDUM:

Substantiality 1

Finality 5

Conclusion 6

Cases Cited

City of Miami v. *Romer*, 58 So.2d 849 4

Department of Banking v. *Pink*, 317 U.S. 264 5

Erdreich v. *Zimmerman*, 190 App.Div. 443 3

HFH Ltd. v. *Superior Court*, 424 U.S. ——, 96 S.Ct. 1495 4

Local No. 548 v. *Curry*, 371 U.S. 544 5

Lomarch Corp. v. *Mayor and Common Council of City of Englewood*, 51 N.J. 108, 237 A 2d 881 3

Mailman Development Corp. v. *City of Hollywood*, 419 U.S. 844 4

Mailman Development Corp. v. *City of Hollywood*, 286 So.2d 614 4

Mills v. *Alabama*, 384 U.S. 214 5

National Association for the Advancement of Colored People v. *Williams*, 359 U.S. 550 5

Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 5

Richfield Oil Corp. v. *State Board*, 329 U.S. 69 5

Zimmerman v. *Roessler & Hasslocker Chemical Co.*, 240 N.Y. 501 3

PAGE

United States Constitution Cited

Fifth Amendment 3

Fourteenth Amendment 3

Statute Cited

7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules Sec. 5519(a) and (e) 3

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APPELLANT'S REPLY MEMORANDUM

Reply to the City's motion to dismiss is required as to substantiality and finality.

Substantiality

By restating the issue as whether the owner has an option to obtain judicial nullification of the ordinance or compel public purchase against the wishes of the enacting government, the City seeks to reduce the probability that

this Court will find substantially. In doing so, however, it has misstated the legal proposition presented by appellant.

The New York Court of Appeals held that absent "governmental displacement of private ownership, occupation or management, there was not 'taking'". Appellant's argument in outline is:

1. The operation or effect of the ordinance is for this this Court to determine (Jurisdictional Statement, p. 15).

2. The mandate of public use itself constitutes an assumption by the City of control of the land, a present invasion of appellant's right to own and manage,* which added the property to the public use (Ibid., pp. 13, 15).

3. Whether unintended or deliberate, an acquisition for public use through use of the zoning power constitutes a taking for which compensation must be paid.

In that context, it is immaterial that appellant seeks compensation "against the wishes of the enacting government." Compensation is due because that government is constitutionally required by reason of the enactment to pay compensation. In that context it is likewise immaterial that appellant could have waived its right to compensation and asked instead for judicial nullification. It did not do so and cannot be required to do so because the

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* That the City had not taken official action other than the ordinance which impeded he owners in the use of the land is irrelevant, since the enactment of the ordinance itself for the purpose of enhancing public resources constituted the taking, without more. Nor is it material, if true, that the owners continued to exclude the public from the park, for appellant French's mortgage security was impaired by enactment of the ordinance, and acts of the owners (North Assemblage Company and South Assemblage Company) in violation of the ordinance would not be binding on French.

Fifth Amendment's compensation clause as made applicable to the City by the Fourteenth Amendment requires that compensation be paid to appellant. Phrasing the issue as the City has obscures the true constitutional issue, which is whether adding private property to public resources constitutes a taking in eminent domain.

Nor is it realistic to argue as does the City in its motion to dismiss that

> "(t)he zoning change had no practical effect. It was a *de facto* nullity and so it remained until it was judicially declared to be what it had been from the beginning."

If, indeed, the enactment constitutes a taking then, the rule being that a statute is required to be construed in favor of its constitutionality, the judicial declaration should be that compensation is owed, not that the ordinance is a nullity. In *Lomarch Corp.* v. *Mayor and Common Council of City of Englewood,* 51 N.J. 108, 273 A. 2d 881, which like the instant case involve reservation of private lands for public park purposes, the Supreme Court of New Jersey did just that, and it is that which this Court is asked to pass upon. To suggest that an ordinance which had the effect of tying up land in litigation for over four years,* during which, as this court can judicially notice, *Erdreich* v. *Zimmerman,* 190 App. Div. 443, 449-450; see *Zimmerman* v. *Roessler & Hasslocker Chemical Co.,* 240 N.Y. 501, the real estate market declined

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* The City's suggestion that "The change was declared void on December 31, 1973" and thus that the effective life of the ordinance was but one year, overlooks the fact that the City appealed and that its appeal automatically stayed the effectiveness of Special Term's declaration of invalidity, until May 4, 1976, the date of the Court of Appeals order herein, New York CPLR 5519(a) and (e).

very substantially from what it was on December 7, 1972 when the parks were mapped as "P" District, "had no practical effect" is to ignore reality. Indeed, the recognition by the New York Court of Appeals of the destructive economic effect of the ordinance (Jurisdictional Statement, p. 13a) is corroboration of the intensely practical effect that enactment of the ordinance had.

Moreover, this Court's denial of certiorari in *Mailman Development Corp.* v. *City of Hollywood,* 419 U.S. 844 is not dispositive of the question of substantiality. *Mailman* did not involve the use of the zoning power to enhance public park resources. It, like *HFH Ltd.* v. *Superior Court,* 424 U.S. , 96 S. Ct. 1495, concerned only whether the reduction of value occasioned by enactment of a zoning ordinance constitutes a taking. That *Mailman* did not involve use of a zoning ordinance to enhance government resources, if not clear from the Florida Appeals Court's decision (286 So.2d 614), is clearly indicated by that court's citation of *City of Miami* v. *Romer,* 58 So.2d 849, and its omission of any reference to the later decision in the same case, reported in 73 So. 2d 285, which held that an action for damages *would* lie where the purpose of an ordinance prohibiting construction within twenty-five feet of the center line of a given street was to enable the city ultimately to acquire property without having to pay for the improvements that otherwise might be erected on it, that is, was to enhance public resources.

Finality*

The City argues that the order appealed from is not final because denial of appellant's motion for summary judgment does not preclude recovery by appellant after a trial at which evidence of governmental displacement of private ownership may be presented.

The decisions of this Court establish that where nothing more remains to be done than the mechanical entry of judgment by the trial court there is finality, *Pope* v. *Atlantic Coast Line R.Co.,* 345 U.S. 379; *Department of Banking* v. *Pink,* 317 U.S. 264, and that on the question of finality this Court is not bound by the face of the judgment, *Local No. 548* v. *Curry,* 371 U.S. 544; *Pope* v. *Atlantic Coast Line R.Co., supra; Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, and will accept an appellant's concession that he has no further factual or legal issues to present to the trial court on remand, *Mills* v. *Alabama,* 384 U.S. 214, 217; *Local No. 438* v. *Curry, supra,* at 551; *Pope* v. *Atlantic Coast Line R.Co., supra,* at 382, especially when the question will, in any event, return to this Court after entry of judgment by the trial court, *Mills* v. *Alabama, supra,* at 217; see *National Association for the Advancement of Colored People* v. *Williams,* 359 U.S. 550. Appellant French concedes that it has no evidence of governmental displacement other than the enactment of the ordinance mandating that the property "shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily." When that concession is made to the Supreme Court of New York County, it will be required by the Court of Appeals' decision herein to enter judgment dis-

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* The finality question raised by the City's motion to dismiss as to the additional "temporary damage" issue raised by appellants other than French has no bearing on the finality of the judgment below as to the taking issue raised by French.

missing the first cause of action of the complaint and the appeal, if now dismissed for want of finality, will be once again presented to this Court. On that concession this Court, on the basis of the above-cited precedents, should hold that there is finality.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Dated: New York, New York
November 1, 1976

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